

***United States Court of Appeals
for the Second Circuit***



APPENDIX

No. 74-1471

No. 74-1471

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

ANTHONY E. LIPANI, Plaintiff-Appellant

~~P/B~~

v.

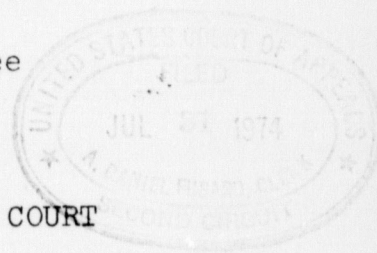
BOHACK CORPORATION, Defendant-Appellee

ROBERT LOESCH, Plaintiff-Appellant

v.

BOHACK CORPORATION, Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

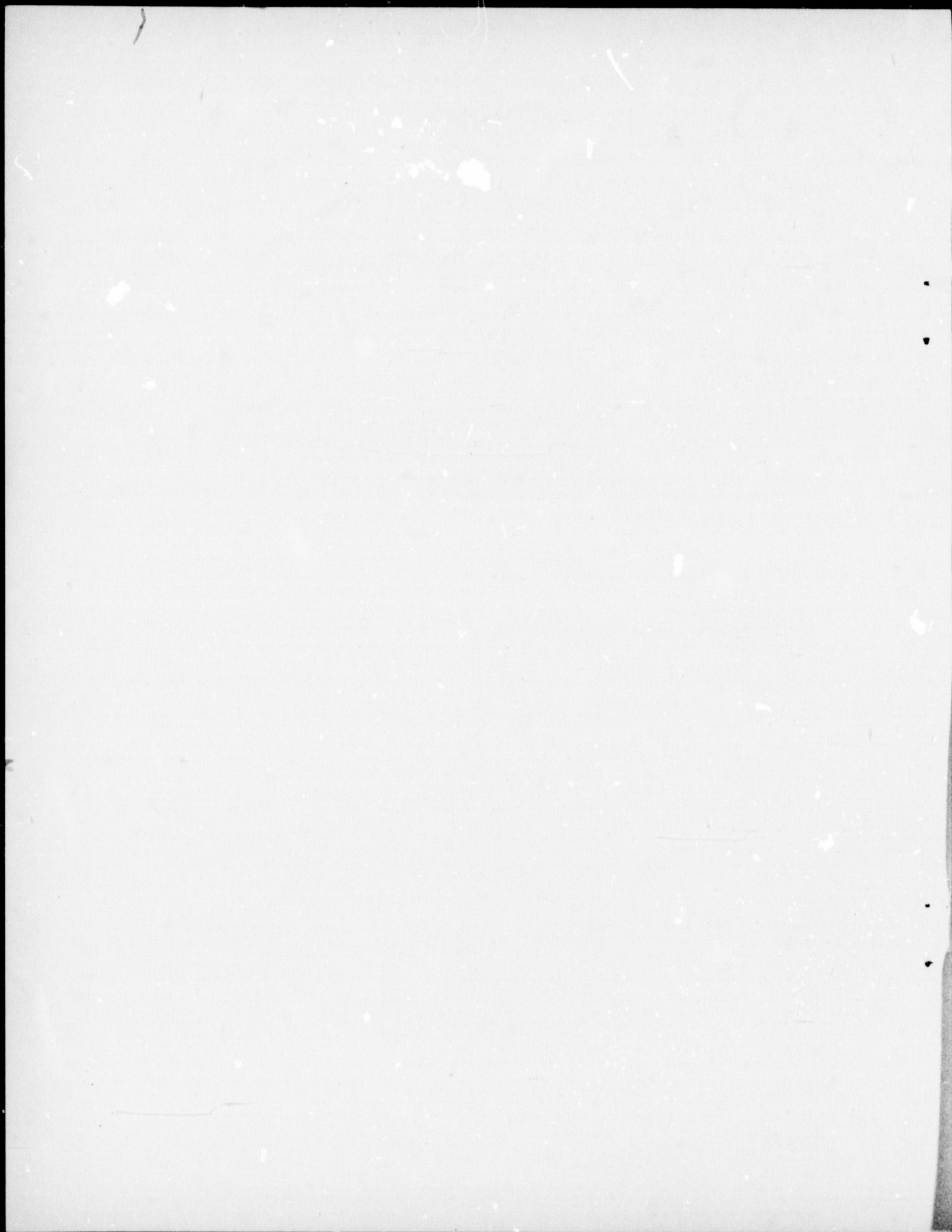


APPENDIX

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
Anthony E. LiPani,

Plaintiff,

-against-

Bohack Corporation,

Defendant.

Civil Action
No. 73 C 740

-----X
Robert Loesch,

Plaintiff,

-against-

Bohack Corporation,

Defendant.

Civil Action
No. 73 C 742

-----X
INDEX TO RECORD ON APPEAL

DATE

FILINGS-PROCEEDINGS

Certified Copy of Docket Entries
(LiPani v. Bohack Corporation 73 C 740) A-B

5/24/73	Complaint filed. Summons issued.	1
6/11/73	Summons returned and filed.	2
6/13/73	Answer filed.	3

(Loesch v. Bohack Corporation 73 C 742)

5/25/73	Complaint filed. Summons issued.	1
6/11/73	Summons returned and filed.	2
6/13/73	Answer filed.	3

(Loesch v. Bohack Corporation 73 C 742)

5/25/73	Complaint filed. Summons issued.	1
6/11/73	Summons returned and filed.	2
6/13/73	Answer filed.	3
7/16/73	By Bartels, J. - Stipulated Order dated 7/11/73 that 73 C 740 and 73 C 742 involve common questions of law and fact and that a consolidation is ordered.	

(Consolidated Actions)

1/11/73	By Bartels, J. Order Consolidating 73 C 740 and 73 C 742 filed.	5
10/11/73	Notice of Motion in Support of Plaintiff's Motion for Summary Judgment filed.	6
10/11/73	Plaintiff's memorandum of law in support of their Motion for Summary Judgment filed.	7
10/16/73	By Bartels, J. - Order dated 10/12/73 consolidating 73 C 740 and 73 C 742 filed.	8
10/25/73	Notice of Cross-Motion returnable for an Order Granting Summary Judgment Dismissing Plaintiffs' Complaints filed.	9
10/25/73	Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment filed.	10
11/1/73	Plaintiffs' Reply Memo of Law in Support of their Motion for Summary Judgment filed.	11
11/15/73	Affidavit of Levy in Opposition to Plaintiffs' Motion for Summary Judgment filed.	12
12/26/73	By Bartels, J. - Order dated 12/21/73 granting Defendant's Motion for Summary Judgment filed.	13
12/26/73	Judgment dated 12/26/73 dismissing both complaints filed.	14
1/24/74	Notice of Appeal in both cases filed.	15
3/27/74	Affidavit of Macbain filed.	16
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JDP:HJF:14
7.722,100

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

*Notes
by*

----- X
Robert Loesch,

Plaintiff,

-against-

Bohack Corporation,

Defendant.
----- X

COMPLAINT

Plaintiff, Robert Loesch, by his attorney, Robert A. Morse, United States Attorney for the Eastern District of New York, for his complaint herein, alleges:

1. This Court has jurisdiction over the matters alleged herein pursuant to the Military Selective Service Act of 1967, 50 U.S.C. App. §459(d).

2. Defendant, Bohack Corporation, is a New York corporation with its principal place of business located at 48-25 Metropolitan Avenue, Brooklyn, New York, engaged in the retail sale of grocery and pharmaceutical items.

3. On May 26, 1972, pursuant to 50 U.S.C. App. §459(d), plaintiff applied to the United States Department of Justice for representation to protect his reemployment rights under the Military Selective Service Act of 1967, which application was approved.

4. On or about March 10, 1969, plaintiff was hired by defendant as a warehouseman and worked in that capacity until July 22, 1969 when plaintiff left his employment with defendant for the purpose of entering the Armed Forces.

5. Plaintiff served in the Armed Forces from August 14, 1969 to September 13, 1971, and was honorably discharged. Plaintiff applied for reemployment with defendant on October 13, 1971 and plaintiff returned to pre-military service employment with defendant on October 18, 1971.

6. Articles X and XI of the applicable Collective Bargaining Agreement between General Warehousemen's Union, Local 852 and defendant entitles employees to certain benefits of employment, among which is vacation with pay and sick leave allowance.

7. In computing plaintiff's vacation pay and sick leave allowance for the year 1971, plaintiff did not receive from defendant the amount of vacation pay and sick leave allowance which plaintiff would have been entitled had plaintiff not entered the Armed Forces but remained continuously in the employ of defendant.

8. Pursuant to the Collective Bargaining Agreement referred to in paragraph 6 hereof, vacation with pay and sick leave allowance depend on continuous employment.

9. Pursuant to 50 U.S.C. App. §459(g) defendant is required to restore plaintiff to his former position of employment with such seniority, status, pay, vacation, and sick leave allowance as he would have had if he had not been serving in the Armed Forces.

10. As a result of defendant's failure to comply with the provisions of 50 U.S.C. App. §459, plaintiff has lost vacation with pay and sick leave allowance amounting to \$538.20.

WHEREFORE, plaintiff demands judgment against defendant in the amount of \$538.20, together with interest, costs and disbursements and such other and further relief as this Court may deem just and proper.

Dated: Brooklyn, New York

May 24, 1973.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff

By Harold J. Friedman
Assistant U.S. Attorney

APPENDIX

their regular weekly rate (including premiums), or the job rate, whichever may be higher. No man shall be discriminated against or shut off from such overtime because of his job rate. Hilo mechanics shall perform their regular tasks.

(G) Any employee called into work overtime on Saturday, Sunday or on his day off, shall be guaranteed five (5) hours of work at the applicable wage rate.

(H) Employees of all departments who are asked to work two (2) hours after their regular quitting time or two (2) hours before their regular starting time, shall receive an additional fifteen (15) minutes rest period after each two (2) hours of overtime, which shall be counted as time worked. However, this shall apply only to the regular forty (40) hour work week, when assigned.

(I) In all departments on any five (5) hour overtime day, a fifteen (15) minute coffee break will be given.

(J) Notice for Saturday overtime work will be given on Thursday to the best of the Company's ability. Notice for Sunday overtime work shall be given on Friday.

(K) Overtime requirements to be given to shop steward two hours after lunch.

ARTICLE X VACATIONS

(A) All full time employees in the employ of the Company for a period of six (6) months of continuous working service shall receive one (1) week's vacation with pay. Employees in

the employ of the Company for twelve (12) months or more shall receive two (2) weeks vacation with pay and one (1) week's scheduled sick leave as defined in Article XII (A). Employees in the employ of the Company five (5) years or more shall be entitled to a third week's vacation. Employees in the employ of the Company ten years (10) or more shall be entitled to a fourth week's vacation. Employees in the employ of the Company twenty-five (25) years or more shall be entitled to a fifth week's vacation.

No employee shall receive a vacation with pay in any one calendar year in excess of the vacation period to which he is entitled above.

(B) Vacation pay shall be computed on the basis of the employee's regular straight time weekly earnings including all premiums, if any.

Night shift premiums shall be included in vacation pay only if such employees regularly worked on night shift immediately preceding their vacations, regardless of time on shift. This shall not apply to regular night shift employees who temporarily replace day shift employees due to vacations, illness, jury duty or death in family.

(C) In cases of promotions and demotions, voluntary or otherwise, the vacation rate shall be based on the employee's record three months prior to his vacation and he can qualify only if his higher rate was maintained for four (4) days a week during this three (3) month period.

(D) Vacations shall be taken according to schedules arranged between the Department Head and the employees and so as not to interfere with the operation of the Company. Pref-

erence of vacation time shall be given to employees within the Warehouse unit in the order of their seniority in the warehouse division. The vacation schedule of the Company shall extend from April 1st to the week of September 30th.

(E) Vacations shall be given in consecutive weeks within the April 1st-September 30th vacation period.

(F) Any employee entitled to a vacation who is laid off for lack of work without receiving his vacation, shall receive whatever vacation pay and sick leave which has been earned in the past year plus vacation pay and sick leave pro-rated on the basis of the period worked during the year of said interruption of employment.

(G) Employees on vacation, who are called back to work due to an emergency, shall be paid at the rate of double time in addition to the vacation pay. An employee, however, shall have the right to refuse the interruption of such vacation.

(H) Any worker who shall complete a full year shall receive his two weeks vacation in that year and one (1) week sick leave, or more, if eligible under the provisions of this Contract. Vacations shall be selected on straight seniority disregarding job classifications, with the exception of hilo mechanics who shall select vacations within their own classification.

(I) Time not worked by an employee because of illness shall be considered time worked for the purpose of computing the vacation of such employee, provided such employee has worked a minimum of thirty (30) days during the year.

(J) Employees unable to work in a new year because of illness shall be paid vacation monies earned during the preceding year on a pro-rated basis. If any such employee becomes deceased, said monies shall be paid to the heir of the deceased employee.

ARTICLE XI

SENIORITY - PROMOTIONS - TRANSFERS

(A) There shall be one seniority list for all warehouse employees mentioned in Article I, excepting those referred to in Section B of this article.

There shall be a separate seniority list for Maintenance Department employees.

Except as otherwise specifically provided hereafter, seniority is to be measured on the basis of length of service in the Company.

(B) Hilo mechanics hired since June 15, 1965 shall be on a separate seniority listing with the following provisions:

1. Bidding into or out of this classification shall not be allowed.
2. There shall be a separate seniority list for layoffs.

NOTE: The above provisions shall not apply to Hilo mechanics hired prior to June 15, 1965.

(C) Maintenance Department employees shall not be allowed to bid into the warehouse departments; nor shall employees of warehouse departments be allowed to bid into the Maintenance Department.

(D) The seniority rule shall be applied to the employees covered by this Agreement for the purpose of layoffs, promotions, demotions, vacation and all other similar purposes in the following manner:

1. Employees who are laid off for lack of work and recalled, shall be entitled to previous seniority rights and privileges under this Agreement if recalled within twenty-four (24) months from the date of layoff and provided that they return to work within three (3) work days after notification from the Company by registered mail at the last known address.

2. Lay off shall be made in accordance with seniority and recall shall be in the reverse order of seniority.

3. The Union recognizes the Company's right to assign employees to work within any classification for a period of ten (10) working days without respect to seniority and shift time, after which time, the job shall be posted, as provided below.

4. If any employee performs a higher paid job on either a dual or part time basis for ten (10) or more working days within any six (6) consecutive weeks, such job shall be posted.

5. All vacant or new jobs shall be posted by the Company for all employees to bid on, either to promote or reduce themselves, or to transfer from nights to days, days to nights, or shift to shift.

6. If no employee bids for any posted job, the Company shall have the right to as-

sign the man with the least amount of seniority. An employee who bids for and accepts a posted job shall not be eligible to bid out for a period of thirty (30) working days. He shall be allowed to bid for a higher posted job.

The Company is required to assign an employee to a job within five (5) working days after posting the job. In the event the Company fails to do so, the employee who is ultimately assigned to that job shall be paid retroactively as if he had performed the work from the sixth working day until the date of actual assignment.

7. If the employee with the least seniority is found to be unqualified for the job his employment shall be terminated. An employee filling a promotional job shall have a maximum thirty (30) day trial period in the job during which time the Company shall properly instruct and train the employee in every aspect of the work on the job, and upon the conclusion of the thirty (30) day trial period, the employee will be granted his seniority in his new job. If at any time during the thirty (30) day trial period the Company is not satisfied with the work of the employee involved, the Company shall take the matter up with the Union, and explain in detail the basis of any dissatisfaction, and in any event, the employee shall not be reassigned during his trial period without prior discussion with the Union.

8. Except as provided above, any employee promoted or transferred from one department to another shall on demotion or retransfer return to the position held immediately prior to the promotion or transfer.

9. In the event of a cutback in help, the employee with the least amount of seniority shall be reduced first in any classification.

10. Jobs made vacant due to sickness or vacation need not be posted.

11. There shall be no preferred list.

12. If in any classification a man is moved involuntarily to another department or another shift without increasing total number of men in classification, he shall have priority to return.

13. If man is upgraded for day and is not needed all day, he shall return to his original job.

14. On bid jobs, man shall be slotted on first day for overtime assignments.

15. If in a classification, there is a temporary lack of work, junior man in classification goes selecting.

16. Men to break in on own shift, where equipment is available.

17. If on general overtime there is no work in a classification the open classification shall be filled in, in the order of seniority.

(E) Promotions shall be based on seniority within the Company. Company agrees that a promoted employee shall be given a maximum 30 working days trial period; said promoted employee will receive his new job rate immediately upon assignment to the promotional job.

(F) Senior employees, from the availability list, desiring promotional jobs made vacant by vacations, illness, jury duty or death in family, shall be temporarily assigned to said job.

(G) When an employee, to suit the convenience of the Company, is transferred temporarily from his regular position to another position, he shall receive his regular daily wage rate, or daily rate applicable to the temporary position, whichever is higher. This shall not apply to demotions, or to work made available instead of layoffs.

(H) In the event employees are temporarily required to perform work of a lower classification, the employee with the least amount of seniority shall be asked to perform the work.

(I) The Company shall notify the Union Steward whenever any temporary employee is discharged and will further agree not to make any inter-departmental changes without notifying the Shop Steward.

(J) All bids for job openings shall be processed through the Shop Steward on the shift.

(K) When posting job openings, the Company shall post together with such notices all pertinent information relating to the posted job.

(L) Junior General Warehousemen shall be assigned to unloading freight. Senior General Warehousemen in the "Freight Gang" shall be the first to come inside the warehouse to work, but shall have the option of remaining in the "Freight Gang." This shall apply to permanent changes only.

(M) Company to have the ability to move men for emergency only and absenteeism, i.e. from grocery to vegetable.

(N) There shall be no trial period on cross bids.

ARTICLE XII
SICK LEAVE — ABSENTEEISM

(A) The Company agrees to grant ten (10) days of sick leave in each calendar year for those employees who have completed at least one (1) calendar year of employment. For those employees who have less than one (1) calendar year of employment as of January 1st of any year, sick leave shall be pro rata until the beginning of the following calendar year. For those eligible for ten (10) days sick leave in each calendar year, five (5) of the ten (10) days may be taken as vacation, outside of the vacation period. The remaining five (5) days can only be taken as regular sick leave.

(B) New pensioners shall be paid any unused sick leave credit upon retirement.

(C) Employees must promptly report any sickness to the warehouse Superintendent or other designated Superior.

Warehouse employees shall call in one (1) hour prior to starting time if unable to report to work; excepting first shift employees, in which case the call shall be made prior to start of shift.

(D) It is agreed that if an employee is absent for two (2) or more consecutive working days, the employee will be required to furnish a doctor's certificate showing his incapacity to work.

(E) In the event an employee's absence is considered excessive by the Company, within each calendar year, the following steps shall be taken:

1. The employee shall receive a written warning.

2. If such absence continues, the employee shall receive a one (1) week's suspension.
3. If such absence further continues, the employee shall be discharged.

(F) The Company agrees to pay up to one (1) week's pay at compensation rate before compensation starts to an employee for his first Workmen's Compensation injury in any calendar year. For any subsequent injuries in the same calendar year, the employee must be disabled two (2) weeks to collect for first five (5) days from the Company.

There shall be no duplication of payments by both the Company and its Insurance Carrier for weekly indemnity cases.

(G) Employee will be paid a day's pay for attending compensation hearings and/or examination.

(H) Falsification of excuse for illness shall be among the grounds for discharge. Sick days are only to be used for personal sickness.

ARTICLE XIII

WELFARE — PENSION

(A) The Company agrees to participate in the Union Welfare program for the employees covered under this Contract for contributing nineteen (19c) cents per hour (maximum \$7.60 per week) per employee to said program, entitled "Family Doctor Plan" and including doctor's office calls, doctor's home calls, out-of-hospital surgery, maternity care, diagnostic X-Rays, laboratory tests, in-hospital surgery, in-hospital medical care and anaesthesiology benefits, among other benefits.

(B) It is also agreed that the Company shall contribute twenty-seven (27¢) cents per hour (maximum \$10.50 per week) for each employee under the jurisdiction of this Union working for said Company, for the Union Pension Plan.

(C) Additional pension and welfare contributions made by other major contributors to the funds will be matched by the Company on same date that other major contributors become liable for same; but not before July 1, 1971.

ARTICLE XIV LEAVE OF ABSENCE

(A) The Company agrees that a leave of absence without pay may be granted for any good and sufficient personal reason (employee illness, injury and pregnancy are not "personal reasons," and are treated separately) at a time the employee may be spared as follows:

<u>Service</u>	<u>Maximum of Leave of Absence</u>
5 years and over, but under 10 years	6 weeks
10 years and over, but under 15 years	7 weeks
Over 15 years	8 weeks

(B) Leaves of absence will not be granted for the purpose of allowing an employee to take another position temporarily, try out new work or venture into business for himself. An employee shall be entitled to only one leave of absence in any three (3) year period.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x
ROBERT LOESCH,

Index No.
73 Civ. 742

Plaintiff,

-against-

BOHACK CORPORATION,

Defendant.
----- -x

Defendant The Bohack Corporation (sued herein as Bohack Corporation) by its attorneys, Battle, Fowler, Lidstone, Jaffin, Pierce & Kheel, answering the complaint herein, alleges:

FIRST: Denies each and every allegation contained in paragraph 1 of the complaint.

SECOND: Denies knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 3 of the complaint, except admits being informed by the United States Department of Labor that plaintiff's claim was forwarded to the Regional Solicitor on July 12, 1972 for referral to the United States Department of Justice.

THIRD: Admits the allegations contained in paragraph 4 of the complaint, except denies that plaintiff left defendant's employ on July 22, 1969.

FOURTH: Admits the allegations contained in paragraph 6 of the complaint. The court is respectfully referred to said collective bargaining agreement for its terms and conditions.

FIFTH: Denies each and every allegation contained in paragraphs 7 and 8 of the complaint.

SIXTH: Denies each and every allegation contained in paragraph 9 of the complaint. The court is respectfully referred to 50 U.S.C. App. §459(g) for its terms.

SEVENTH: Denies each and every allegation contained in paragraph 10 of the complaint.

FIRST AFFIRMATIVE DEFENSE

EIGHTH: The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

NINTH: The court lacks jurisdiction over the subject matter of the complaint.

WHEREFORE, defendant respectfully demands judgment dismissing the complaint together with the costs

and disbursements of this action and such other and further relief as to the Court may seem just and proper.

BATTLE, FOWLER, LIDSTONE, JAFFIN,
PIERCE & KHEEL
Attorneys for Defendant
280 Park Avenue
New York, New York 10017
(212) 986-8330

By: _____
Raymond F. Gregory
A Member of the Firm

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Anne Marie Bursky, being duly sworn, deposes and says, that deponent is not a party to this action, is over the age of eighteen years and resides at 426 East 66th Street, New York, New York 10021. That on the 12th day of June, 1973, deponent served the within Answer upon Robert A. Morse, United States Attorney, Eastern District of New York, attorney for plaintiff in this action at 225 Cadman Plaza East, Brooklyn, New York 11201 the address designated by said attorney for that purpose by depositing same in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ANNE MARIE BURSKY

Sworn to before me this
17th day of June, 1973.

JDP:HJF:1q
F.#722,058

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U.S. Atty EDNY
Civil Division

Anthony E. Li Pani,

Plaintiff,

-against-

COMPLAINT

Bohack Corporation,

Defendant.

Approved

UK

Date of filing

5/24/73

Plaintiff, Anthony E. Li Pani, by his attorney,
Robert A. Morse, United States Attorney for the Eastern
District of New York, for his complaint herein, alleges:

1. This Court has jurisdiction over the matters
alleged hereir pursuant to the Military Selective Service
Act of 1967, 50 U.S.C. App. §459(d).

2. Defendant, Bohack Corporation, is a New York
corporation with its principal place of business located
at 48-25 Metropolitan Avenue, Brooklyn, New York, engaged
in the retail sale of grocery and pharmaceutical items.

3. On May 26, 1972, pursuant to 50 U.S.C. App.
§459(d), plaintiff applied to the United States Department
of Justice for representation to protect his reemployment
rights under the Military Selective Service Act of 1967,
which application was approved.

4. On or about May 6, 1969, plaintiff was hired by
defendant as a warehouseman and worked in that capacity
until July 22, 1969 when plaintiff left his employment with
defendant for the purpose of entering the Armed Forces.

5. Plaintiff served in the Armed Forces from July 28, 1969 to August 2, 1971, and was honorably discharged. Plaintiff applied for reemployment with defendant on October 13, 1971 and plaintiff returned to pre-military service employment with defendant on October 18, 1971.

6. Articles X and XI of the applicable Collective Bargaining Agreement between General Warehousemen's Union, Local 852 and defendant entitles employees to certain benefits of employment, among which is vacation with pay and sick leave allowance.

7. In computing plaintiff's vacation pay and sick leave allowance for the year 1971, plaintiff did not receive from defendant the amount of vacation pay and sick leave allowance which plaintiff would have been entitled had plaintiff not entered the Armed Forces but remained continuously in the employ of defendant.

8. Pursuant to the Collective Bargaining Agreement referred to in paragraph 6 hereof, vacation with pay and sick leave allowance depend on continuous employment.

9. Pursuant to 50 U.S.C. App. §459(g) defendant is required to restore plaintiff to his former position of employment with such seniority, status, pay, vacation, and sick leave allowance as he would have had if he had not been serving in the Armed Forces.

10. As a result of defendant's failure to comply with the provisions of 50 U.S.C. App. §459, plaintiff has lost vacation with pay and sick leave allowance amounting to \$717.60.

WHEREFORE, plaintiff demands judgment against defendant in the amount of \$717.60, together with interest, costs and disbursements and such other and further relief as this Court may deem just and proper.

Dated: Brooklyn, New York

May 23, 1973

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff

By Harold J. Friedman
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
ANTHONY E. LI PANI,

Plaintiff,

Index No.
73 Civ. 740

-against-

ANSWER

BOHACK CORPORATION,

Defendant.
-----X

Defendant The Bohack Corporation (sued herein as Bohack Corporation) by its attorneys, Battle, Fowler, Lidstone, Jaffin, Pierce & Kheel, answering the complaint herein, alleges:

FIRST: Denies each and every allegation contained in paragraph 1 of the complaint.

SECOND: Denies knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 3 of the complaint, except admits being informed by the United States Department of Labor that plaintiff's claim was forwarded to the Regional Solicitor on July 12, 1972 for referral to the United States Department of Justice.

THIRD: Admits the allegations contained in paragraph 4 of the complaint, except denies that plaintiff left defendant's employ on July 22, 1969.

FOURTH: Admits the allegations contained in

paragraph 5 of the complaint except upon information and belief denies that plaintiff completed his service with the Armed Forces on August 2, 1972.

FIFTH: Admits the allegations contained in paragraph 6 of the complaint. The court is respectfully referred to said collective bargaining agreement for its terms and conditions.

SIXTH: Denies each and every allegation contained in paragraphs 7 and 8 of the complaint.

SEVENTH: Denies each and every allegation contained in paragraph 9 of the complaint. The court is respectfully referred to 50 U.S.C. App. §459(g) for its terms.

EIGHTH: Denies each and every allegation contained in paragraph 10 of the complaint.

FIRST AFFIRMATIVE DEFENSE

NINTH: The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

TENTH: The court lacks jurisdiction over the subject matter of the complaint.

WHEREFORE, defendant respectfully demands judgment dismissing the complaint together with the costs

and disbursements of this action and such other and further relief as to the Court may seem just and proper.

BATTLE, FOWLER, LIDSTONE, JAFFIN,
PIERCE & KHEEL
Attorneys for Defendant
280 Park Avenue
New York, New York 10017
(212) 986-8330

By: _____

Raymond F. Gregory
A Member of the Firm

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Anne Marie Bursky, being duly sworn, deposes and says, that deponent is not a party to this action, is over the age of eighteen years and resides at 426 East 66th Street, New York, New York 10021. That on the 12th day of June, 1973, deponent served the within Answer upon Robert A. Morse, United States Attorney, Eastern District of New York, attorney for plaintiff in this action at 225 Cadman Plaza East, Brooklyn, New York 11201 the address designated by said attorney for that purpose by depositing same in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ANNE MARIE BURSKY

Sworn to before me this
day of June, 1973.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
ANTHONY E. LI PANI,

Plaintiff,

-against-

(J.R.B.)
73 Civ. 740

BOHACK CORPORATION,

Defendant.
-----x

STIPULATION

ROBERT LOESCH,

Plaintiff,

-against-

(J.R.B.)
73 Civ. 742

BOHACK CORPORATION,

Defendant.
-----x

IT IS HEREBY STIPULATED AND AGREED by and between
counsel for the parties to the above entitled actions that
said actions involve common questions of law and fact and
that an order consolidating said actions will avoid
unnecessary cost and delay.

Dated: Brooklyn, New York
July 11, 1973

BATTLE, FOWLER, LIDSTONE, JAFFIN,
PIERCE & KHEEL

By: *Robert A. Morse*

A Member of the Firm

Attorneys for The Bohack Corporation

ROBERT A. MORSE
United States Attorney
Eastern District of New York

By: *Harold J. Friedman*

Harold J. Friedman
Assistant U.S. Attorney
Attorney for Anthony E. Li Pani
and Robert Loesch

So Ordered:

JBP:HJF:ec
P. 4722058

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
ANTHONY E. LI PANI,

Plaintiff,

- against -

10/10/73
BOHACK CORPORATION,

Defendant.

Civil Action
No. 73 C 740

----- X
ROBERT LOESCH,

Plaintiff,

- against -

BOHACK CORPORATION,

Defendant.

Civil Action
No. 73 C 742

NOTICE OF MOTION
FOR SUMMARY JUDG-
MENT

----- X
S I R S :

PLEASE TAKE NOTICE that upon the annexed Plain-
tiffs' Rule 9(g) Statement, Memorandum of Law and exhibits
attached thereto, and upon all the pleadings and proceedings
heretofore had herein, the undersigned will move this Court
on October 26, 1973 at 10:00 a.m. in the forenoon of that
day, or as soon thereafter as counsel can be heard, at the
United States Courthouse, 225 Cadman Plaza East, Brooklyn,
New York 11201, before the Hon. John R. Bartels, Courtroom
Number 4, for an order pursuant to Rule 56 of the Federal
Rules of Civil Procedure granting summary judgment in favor
of the plaintiffs on the grounds that there is no genuine
issue as to any material fact herein necessary for their
being granted summary judgment, and that the plaintiffs are
entitled to summary judgment as a matter of law, and for
such other and further relief as to this Court may see

and proper.

Dated: Brooklyn, New York
October 10, 1973

Yours, etc.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiffs
225 Cadman Plaza East
Brooklyn, New York

By:

HAROLD J. FRIEDMAN
Assistant U. S. Attorney

JDP:HJF:1g
F.#722,058
#722,106

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
Anthony E. Li Pani,

Plaintiff,

Civil Action
No. 73 C 740

-against-

Bohack Corporation,

Defendant.
----- X

Robert Loesch,

Plaintiff,

Civil Action
No. 73 C 742

-against-

Bohack Corporation,

Defendant.
----- X

STATEMENT OF MATERIAL FACTS TO WHICH
THERE IS NO GENUINE ISSUE TO BE TRIED
PURSUANT TO RULE 9(g) OF THE LOCAL RULES

There is no genuine issue as to the following
material facts:

1. This Court has jurisdiction over the matters
alleged herein pursuant to the Military Selective Service
Act of 1967, 50 U.S.C. App. §459(d).

2. Defendant, Bohack Corporation, is a New York
corporation with its principal place of business located at
48-25 Metropolitan Avenue, Brooklyn, New York, engaged in
the retail sale of grocery and pharmaceutical items.

3. Articles X and XII of the applicable Collective
Bargaining Agreement between General Warehousemen's Union,
Local 852 and defendant which was in effect from June 15,
1970 to June 15, 1973, entitles employees to certain benefits
of employment, among which is two weeks vacation with pay
each year and ten days sick leave allowance each year.
See Exhibit A.

PLAINTIFF - LI PANI

4. On or about May 6, 1969, plaintiff Li Pani was hired by defendant as a warehouseman in "other than a temporary position" and he worked in that capacity until July 22, 1969 when he left his employment with defendant for the purpose of entering the Armed Forces.

5. Plaintiff Li Pani served in the Armed Forces from July 28, 1969 to August 2, 1971, and was honorably discharged. See Exhibit B. He applied for reemployment with defendant on October 13, 1971 and he returned to pre-military service employment with defendant on October 18, 1971.

6. In computing plaintiff Li Pani's vacation pay and sick leave allowance for the year 1971, he did not receive from defendant any vacation with pay or sick leave allowance which he would have been entitled had he not entered the Armed Forces but remained continuously in the employ of defendant.

7. On May 26, 1972, pursuant to 50 U.S.C. App. §459(d), plaintiff Li Pani applied to the United States Department of Justice for representation to protect his reemployment rights under the Military Selective Service Act of 1967, which application was approved. See Exhibit C.

8. Pursuant to 50 U.S.C. App. §459(g) defendant is required to restore plaintiff Li Pani to his former position of employment with such seniority, status, pay, vacation, and sick leave allowance as he would have had if he had not been serving in the Armed Forces.

9. As a result of defendant's failure to comply with the provisions of 50 U.S.C. App. §459, plaintiff Li Pani has lost vacation with pay and sick leave allowance amounting to \$717.60.

PLAINTIFF - LOESCH

10. On or about March 10, 1969, plaintiff Loesch was hired by defendant as a warehouseman in "other than a temporary position" and he worked in that capacity until July 22, 1969 when he left his employment with defendant for the purpose of entering the Armed Forces.

11. Plaintiff Loesch served in the Armed Forces from August 14, 1969 to September 15, 1971, and was honorably discharged. See Exhibit D. Plaintiff Loesch applied for reemployment with defendant on October 13, 1971 and he returned to pre-military service employment with defendant on October 18, 1971.

12. In computing plaintiff Loesch's vacation pay and sick leave allowance for the year 1971, he did not receive from defendant any vacation pay and sick leave allowance which he would have been entitled had he not entered the Armed Forces but remained continuously in the employ of defendant.

13. On May 26, 1972, pursuant to 50 U.S.C. App. §459(d), plaintiff Loesch applied to the United States Department of Justice for representation to protect his reemployment rights under the Military Selective Service Act of 1967, which application was approved. See Exhibit E.

14. Pursuant to 50 U.S.C. App. §459(g) defendant is required to restore plaintiff Loesch to his former position of employment with such seniority, status, pay, vacation, and sick leave allowance as he would have had if he had not been serving in the Armed Forces.

15. As a result of defendant's failure to comply with the provisions of 50 U.S.C. App. §459, plaintiff Loesch has lost vacation with pay and sick leave allowance amounting to \$538.20.

Dated: Brooklyn, New York
October 10, 1973

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiffs
225 Cadman Plaza East
Brooklyn, New York 11201

By Harold J. Friedman
Harold J. Friedman
Assistant U.S. Attorney

EXHIBIT A

The first part of Exhibit A consists of the collective bargaining agreement and is reproduced supra at p. 6a.

SCHEDULE "A"—Effective June 15, 1970

**DEPARTMENT
GROCERY WAREHOUSE AND BAKERY WAREHOUSE**

	Hourly	Daily	Weekly	Overtime
Checkers	\$4.285	\$34.28	\$171.40	\$6.4275
Selectors				
(incl. short man)	4.185	33.48	167.40	6.2775
General Warehousemen	4.035	32.68	163.40	6.1275
Machine Operators	4.283	34.28	171.40	6.4275
Working Foreman	4.435	35.48	177.40	6.6525
Asst. Rec. & Ship. Clerks	4.435	35.48	177.40	6.6525
Hilo Mechanics	4.585	36.68	183.40	6.8775
Scrubber Machine Opers.	4.185	33.48	167.40	6.2775
Walkie Stacker Opers.	4.185	33.48	167.40	6.2775
*Packers	3.31	26.48	132.40	4.965
Porter Coopers	3.20	25.60	128.00	4.80

*Rates for Packers employed as of June 15, 1970.

Newly hired Packers: Begin at \$90.00; after 30 days — \$95.00; plus following progression increases, if employed on following dates:
12/15/70 — \$10.00; 6/15/71 — \$12.00; 12/15/71 — \$10.00; 6/15/72 — \$10.00; 12/15/72 — \$10.00. However, upon completion of 60 months continuous service, the rate shall be \$132.40.

Lead Packers to receive 10¢ per hour over Packer Wage Rate.

PRODUCE WAREHOUSE

Checkers	\$4.285	\$34.28	\$171.40	\$6.4275
Selectors	4.185	33.48	167.40	6.2775
General Warehousemen	4.135	33.08	165.40	6.2025
Asst. Rec. & Ship. Clerks	4.435	35.48	177.40	6.6525

MAINTENANCE DEPARTMENT

	Hourly	Daily	Weekly	Overtime
Mechanics & Carpenters	\$4.4975	\$35.98	\$179.90	\$6.7463
Semi-Skilled Mechanics	4.3788	35.03	175.15	6.6082
Laborers & Helpers	4.2725	34.18	170.90	6.4088
Working Foreman & Store Supervisor	4.7475	37.98	189.90	7.1213
NIGHT PREMIUM — 20¢ per hour				
ICE BOX PREMIUM — 15¢ per hour				

SCHEDULE "A" — Effective June 15, 1971

**DEPARTMENT
GROCERY WAREHOUSE AND BAKERY WAREHOUSE**

	Hourly	Daily	Weekly	Overtime
Checkers	\$4.585	\$36.68	\$183.40	\$6.8775
Selectors				
(incl. short man)	4.485	35.88	179.40	6.7275
General Warehousemen	4.385	35.08	175.40	6.5775

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Exh. A

1. LAST NAME, FIRST NAME, MIDDLE NAME LE PAUL ANTHONY EDGAR		12. SERVICE NUMBER NA		2. BLOOD GROUP CCO	
4. DEPARTMENT, COMPONENT AND BRANCH OR CLASS ARMY AUS ORD C		5a. GRADE, RATE OR RANK SP4	5b. PAY GRADE EM	6. DATE OF RANK 3	7. DATE OF BIRTH 19
7. U.S. CITIZEN <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		8. PLACE OF BIRTH (City and State or Country) Houston, Texas		9. DATE OF BIRTH 19	
10a. SELECTIVE SERVICE NUMBER 50 51 49 209		10b. SELECTIVE SERVICE LOCAL BOARD NUMBER, CITY, COUNTY, STATE AND ZIP CODE LB #51 Brooklyn, New York		11. DATE OF BIRTH 28	
13. TYPE OF TRANSFER OR DISCHARGE Trans to USAR		14. STATION OR INSTALLATION AT WHICH EFFECTED Port Hamilton New York		15. EFFECTIVE DATE 2	
16. LAST DUTY ASSIGNMENT AND MAJOR COMMAND USARPAC		17. CHARACTER OF SERVICE HONORABLE		18. TYPE OF CERTIFICATE ISSUED NONE	
19. Co D 7th Sst Bn 1st Pde 5th Inf Div(M)		20. DISTRICT, AREA COMMAND OR CORPS TO WHICH RESEVIST TRANSFERRED Trans to USAR Cont Gd(Reinf) USARPAC St Louis Missouri 63132		21. REENLISTMENT CODE RE 1	
22. TERMINAL DATE OF RESERVE/UMTS OBLIGATION 27 Jul 75		23. SOURCE OF ENTRY: <input type="checkbox"/> ENLISTED (Under Enlistment) <input type="checkbox"/> ENLISTED (Under Service) <input type="checkbox"/> REENLISTED <input type="checkbox"/> OTHER NA		24. DATE OF ENTRY NA	
25. PRIOR REGULAR ENLISTMENT NONE		26. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SVC PVT E-1		27. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State) AFES Ft Hamilton New York	
28. HOME OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE (Street, A.D. Co, County, State and ZIP Code) 274 Irving Ave Apt 4 Brooklyn, New York		29. STATEMENT OF SERVICE		30. YEARS MONTHS DAYS	
31. SPECIALTY NUMBER & TITLE 63A10 Mech Maint Apprentice		32. RELATED CIVILIAN OCCUPATION AND O.I.T. NUMBER 620.261 Automobile Mechanic		33. CREDITABLE FOR BASIC PAY PURPOSES	
34. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED National Defense Service Medal, Vietnam Service Medal, Sharpshooter Badge(M16)		35. (1) NET SERVICE THIS PERIOD		36. (2) OTHER SERVICE	
37. EDUCATION AND TRAINING COMPLETED NONE		38. (3) TOTAL (Line (1) plus Line (2))		39. TOTAL ACTIVE SERVICE	
40. NON-PAY PERIODS TIME LOST (Under 1 Year)		41. DAYS ACCRUED LEAVE PAID		42. INSURANCE IN FORCE (USLI or USGLI)	
43. NONE		44. 1		45. YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	
46. VA CLAIM NUMBER NA		47. SERVICEMEN'S GROUP LIFE INSURANCE COVERAGE		48. AMOUNT OF ALLOTMENT	
49. REMARKS High School 4 years General Blood Group B+ Retained in Service 5 days Convenience of the Government Vietnam Service 2 July 1970- 1 July 1971		50. \$10,000 <input type="checkbox"/> \$5,000 <input type="checkbox"/> \$15,000 <input checked="" type="checkbox"/>		51. NA	
52. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE (Street, A.D. Co, County, State and ZIP Code) 74 Irving Avenue Brooklyn, N. Y. 11237		53. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED <i>Anthony E. Edgar</i>			
54. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER A. RODRIGUEZ CW2, USA, Asst AG		55. SIGNATURE OF OFFICER AUTHORIZED TO SIGN <i>[Signature]</i>			

RECORDED
AUG 3 1971
ANTHONY E. EDGAR
KINGS COUNTY CLERK
CHARTERED COURT CLERK

EXHIBIT B

I hereby request the Department of Justice to intercede in my behalf by filing an action in the United States District Court to protect my reemployment rights under Section 9 of the Military Selective Service Act of 1967, as amended, and acts related thereto.

I understand that my request for representation pledges me to cooperate with the United States Attorney in every way in the prosecution of my claim, and to give prompt notice of any change in my mailing address.

Anthony E. LoPano
(Veteran's Signature)

Nov 26, 1972
(Date)

30-3966
(File No.)

EXHIBIT C

THIS IS AN IMPORTANT RECORD SAFEGUARD IT									
1. LAST NAME, FIRST NAME, MIDDLE NAME LOFTON ROBERT ALFRED									
2. SERVICE NUMBER NA									
3. SOCIAL SECURITY NUMBER 122 161 071									
4. ENTITLEMENT TO COMPENSATION AND DEPENDENT CLASS ARMY AUS INF									
5. GRADE, RATE OR RANK SP4									
6. PAY GRADE E4									
7. DATE OF RANK 24 MAR 70									
8. DATE OF BIRTH 24 MAR 47									
9. PLACE OF BIRTH (City and State or Country) BROOKLYN NY									
10. SELECTIVE SERVICE NUMBER 50 60 49 193									
11. SELECTIVE SERVICE LOCAL BOARD NUMBER, CITY, COUNTY, STATE AND ZIP CODE LB #60 JAMAICA NY 11432									
12. TYPE OF TRANSFER OR DISCHARGE TRF TO USAR SEE 16									
13. STATION OR INSTALLATION AT WHICH EFFECTED FT DIX NJ									
14. REASON AND AUTHORITY AR 635-200 SUB 211 DA HSO 131940Z AUG 71									
15. DATE OF TRANSFER OR DISCHARGE 13 AUG 75									
16. LAST DUTY ASSIGNMENT AND MAJOR COMMAND CO B HQS COMD USATCI FT DIX NJ 1A									
17. CHARACTER OF SERVICE HONORABLE									
18. DISTRICT, AREA COMMAND OR CORPS TO WHICH THE SERVICEMAN IS TRANSFERRED TRF TO USAR CON GP (AHL TNG) USAAC ST LOUIS MO									
19. TYPE OF ENTRY REINLISTED									
20. DATE OF ENTRY 13 AUG 75									
21. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SVC PV1									
22. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State) BROOKLYN NY									
23. STATEMENT OF SERVICE 1 YEAR 10 MONTHS 10 DAYS									
24. CREDIT TABLE FOR BASIC PAY PURPOSES 1 (1) NET SERVICE THIS PERIOD 1 10 10									
25. CREDIT TABLE FOR BASIC PAY PURPOSES 0 0 10									
26. CREDIT TABLE FOR BASIC PAY PURPOSES 1 10 10									
27. TOTAL ACTIVE SERVICE 1 10 10									
28. FOREIGN AND/OR SEA SERVICE SEE 30 0 11 16									
29. MEDALS, DECORATIONS, CITATIONS AND CAMPAIGN ribbons AWARDED OR AUTHORIZED COMBAT INFANTRY BADGE ARMY COMMENDATION MEDAL NATIONAL DEFENSE SERVICE MEDAL VIETNAM SERVICE MEDAL BRONZE STAR MEDAL VIETNAM CAMPAIGN MEDAL 2 OS BARS AIR MEDAL MARKSMAN M-16									
30. EDUCATION AND TRAINING COMPLETED LT WPNS INF 11B10 9 WKS 69									
31. NON-PAY PERIODS TIME LOST (Specifying Time Period) 8 JAN 70 - 24 MAR 70 1 APR 70 - 8 APR 70									
32. DAYS ACCRUED LEAVE PAID NONE									
33. VA CLAIM NUMBER NA									
34. SERVICE MEN'S GROUP LIFE INSURANCE COVERAGE YES \$15,000									
35. AMOUNT OF ALLOTMENT NA									
36. MONTHLY ALLOTMENT DISCONTINUED NA									
37. REMARKS BLOOD CP O+ TABLE 2-3 AR 601-210 APPLIES RVT 16 APR 70 - 24 MAR 71 84 DAYS LOST UNDER 10 USC 972 4 YES 13 (DIPL)									
38. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE 63-19 70TH ST MIDDLE VILLAGE (QUEENS) NY 11379									
39. TYPE OF NAME, GRADE AND TITLE OF AUTHORIZING OFFICER RICHARD A JEROME 2LT MA ASST CHIEF ENL SR									
40. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED Robert A. Jerome									
41. SIGNATURE OF OFFICER AUTHORIZED TO SIGN RICHARD A JEROME									

- 39a -

I hereby request the Department of Justice to intercede in my behalf by filing an action in the United States District Court to protect my reemployment rights under Section 9 of the Military Selective Service Act of 1967, as amended, and Acts related thereto.

I understand that my request for representation pledges me to cooperate with the United States Attorney in every way in the prosecution of my claim, and to give prompt notice of any change in my mailing address.

Robert Loesch
(Veteran's Signature)

MAY 26, 1972
(Date)

30-3967
(File No.)

- 40a -

EXHIBIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

ROBERT H. LI PANI,

Plaintiff,

-against-

73 Civ. 540

BOHACK CORPORATION,

Defendant.

-----x

NOTICE OF
CROSS MOTION

ROBERT LOESCH,

Plaintiff,

-against-

73 Civ. 542

BOHACK CORPORATION,

Defendant.

-----x

PLEASE TAKE NOTICE that upon the annexed affidavit of Robert H. Bohack sworn to on October 23, 1973 and the pleadings and proceedings heretofore had herein, defendant The Bohack Corporation will move this Court before the Honorable John R. Bartels at the U.S. Courthouse, 225 Cadman Plaza East, Brooklyn New York on November 9, 1973 at 10:00 o'clock in the forenoon of that day for an order granting summary judgment dismissing plaintiffs' complaints pursuant to Rule 56 of the Federal Rules of Civil Procedure and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
October 23, 1973

BATTLE, FOWLER, LIDSTONE, JAFFIN,
PIERCE & KHERL

BY Richard A. Liden
A Member of the Firm
Attorneys for Defendant
280 Park Avenue
New York, New York 10017
(212) 986-8330

TO:

ROBERT A. MORSE
Attorney
Eastern District of New York
Attorney for Plaintiffs
220 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

ANTHONY E. LI PANI,

Plaintiff,

-against-

73 Civ. 740

BOHACK CORPORATION,

Defendant.

-----x

AFFIDAVIT

ROBERT LOESCH,

Plaintiff,

-against-

73 Civ. 542

BOHACK CORPORATION,

Defendant.

-----x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Robert H. Bohack, being duly sworn, deposes and says:

1. I am the personnel director of defendant The Bohack Corporation (Bohack) and submit this affidavit in opposition to plaintiffs' motion for summary judgment and in support of Bohack's cross-motion for summary judgment. I am fully familiar with the facts relating to plaintiffs' employment with Bohack.

2. Plaintiff Anthony E. Li Pani (Li Pani) was employed by Bohack as a general warehouseman on May 6, 1969 and worked in that capacity until July 14, 1969 (two months and eight

days) when he left Bohack's employ and entered military service. Upon discharge from military service Li Pani was re-employed by Bohack on October 18, 1971. Li Pani's base weekly salary from October 18, 1971 through December 31, 1971 was \$183.40 (including night shift differential). At the end of the calendar year of 1971, Li Pani had worked a total of approximately four months and twenty days including time worked in the spring of 1969. When Li Pani was re-employed by Bohack he was given full seniority credit for the time he spent in military service and participated in all other benefits available to employees of Bohack returning from an extended leave of absence pursuant to the applicable collective bargaining agreement. Li Pani received a two week vacation in June, 1972 and all sick leave benefits to which he was entitled.

3. Plaintiff Robert Loesch (Loesch) was employed by Bohack on March 10, 1969 as a general warehouseman and worked in that capacity until July 31, 1969 (four months and twenty days) when he left Bohack's employ and entered military service. Upon discharge from military service Loesch was re-employed by Bohack on October 18, 1971. Loesch's base weekly salary from October 18, 1971 through December 31, 1971 was \$183.40 (including night shift differential). As of December 31, 1971 Loesch had worked a total of approximately seven months and two days including the time he worked in the spring of 1969. When Loesch was re-employed by Bohack he was given full seniority credit for the time he spent in military service and participated in all other benefits available to employees of Bohack returning from an extended leave of absence pursuant to the applicable collective bargaining agreement. Loesch received a one week vacation in December, 1971;

a two week vacation in June, 1972 and all sick leave benefits to which he was entitled.

4. As general warehouse employees, the terms and conditions of plaintiffs' employment are governed by a collective bargaining agreement entered into between Bohack and General Warehouseman's Union, Local 852. A copy of the agreement is annexed hereto as Exhibit A. Pursuant to that agreement the vacation and sick leave allowances sought by plaintiffs herein must be earned by the performance of actual work.* Vacation and sick leave allowances at Bohack are earned benefits, they do not accrue automatically with the mere passage of time.

5. In negotiating the terms of the collective bargaining agreement the concept that a vacation is an earned benefit was considered by all parties to be indisputable. Accordingly, in the specific situation not intended to be covered by the general rule, the agreement spells out when an employee can receive vacation benefits without having actually worked. Article X(I) provides that if an employee works for a minimum of thirty days time not worked because of illness shall be considered time worked for vacation purposes. In lay-off and illness situations preventing an employee from actually taking a vacation, Articles X(F) and X(J) respectively, provide for a prorated payment based upon time worked.

WHEREFORE, deponent respectfully asks for an order


* Since neither Li Pani nor Loesch suffered an illness in 1971, the sick leave benefit sought must refer to the provisions in Articles X(A) and XII(A) of the collective bargaining agreement which permit an employee to take five of their ten day sick leave as vacation.

denying plaintiffs' motion for summary judgment and granting
Bonack's cross motion for summary judgment dismissing plaintiffs'
complaints.

Robert H. Bonack

ROBERT H. BONACK

Sworn to before me this
23rd day of October, 1973.



DAVID FLEISCHER
NOTARY PUBLIC, State of New York
No. 31-4505893
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x
ANTHONY E. LI PANI,

Plaintiff,

-against-

73 Civ. 540

BOHACK CORPORATION,

Defendant.

----- -x
ROBERT LOESCH,

Plaintiff,

-against-

73 Civ. 542

BOHACK CORPORATION,

Defendant.
----- -x

STATEMENT PURSUANT TO
GENERAL RULE 9(g)

This statement is submitted by defendant, The Bohack Corporation (Bohack), pursuant to General Rule 9(g) of this Court in opposition to plaintiffs' motion for summary judgment and in support of Bohack's cross-motion for summary judgment. Bohack contends that no genuine issue to be tried exists with respect to the following material facts:

1. Plaintiff Anthony E. Li Pani (Li Pani) was employed by Bohack as a general warehouseman on May 6, 1969 and worked in that capacity until July 14, 1969 (two months and eight days) when he left Bohack's employ and entered military service. Upon discharge from military service Li Pani was re-employed by Bohack on October 18, 1971. Li Pani's base weekly salary from October 18, 1971 through December 31, 1971 was \$183.40 (including

night shift differential). At the end of the calendar year of 1971, Li Pani had worked a total of approximately four months and twenty days including time worked in the spring of 1969. When Li Pani was re-employed by Bohack he was given full seniority credit for the time he spent in military service and participated in all other benefits available to employees of Bohack returning from an extended leave of absence pursuant to the applicable collective bargaining agreement. Li Pani received a two week vacation in June, 1972 and all sick leave benefits to which he was entitled.

2. Plaintiff Robert Loesch (Loesch) was employed by Bohack on March 10, 1969 as a general warehouseman and worked in that capacity until July 31, 1969 (four months and twenty days) when he left Bohack's employ and entered military service. Upon discharge from military service Loesch was re-employed by Bohack on October 18, 1971. Loesch's base weekly salary from October 18, 1971 through December 31, 1971 was \$183.40 (including night shift differential). As of December 31, 1971 Loesch had worked a total of approximately seven months and two days including the time he worked in the spring of 1969. When Loesch was re-employed by Bohack he was given full seniority credit for the time he spent in military service and participated in all other benefits available to employees of Bohack returning from an extended leave of absence pursuant to the applicable collective bargaining agreement. Loesch received a one week vacation in December, 1971; a two week vacation in June, 1972 and all sick leave benefits to which he was entitled.

3. As general warehouse employees, the terms and

conditions of plaintiffs' employment are governed by a collective bargaining agreement entered into between Bohack and General Warehouseman's Union, Local 852. Pursuant to that agreement the vacation and sick leave allowances sought by plaintiffs herein must be earned by the performance of actual work. Vacation and sick leave allowances at Bohack are earned benefits, they do not accrue automatically with the mere passage of time.

Dated: New York, New York
October 23, 1973

BATTLE, FOWLER, LIDSTONE, JAFFIN,
PIERCE & KHEEL

BY Richard Adelman
A Member of the Firm

Attorneys for Defendant
280 Park Avenue
New York, New York 10017
(212) 986-8330

TO:

ROBERT A. MORSE
U.S. Attorney
Eastern District of New York
Attorney for Plaintiffs
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
ANTHONY E. LI PANI, *et al*

Plaintiff,

-against-

73 Civ. 540

BOHACK CORPORATION,

Defendant.

-----x
ROBERT LOESCH,

Plaintiff,

-against-

73 Civ. 542

BOHACK CORPORATION,

Defendant.

AFFIDAVIT

-----x
STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Melvin Levy, being duly sworn, deposes and says:

1. I am the Executive Vice President - Administration of The Bohack Corporation ("Bohack"), sued herein as Bohack Corporation, and submit this affidavit in opposition to plaintiff's motion for summary judgment and in support of Bohack's cross motion for summary judgment.

2. In my official capacity I have the ultimate responsibility for negotiating the terms of all collective bargaining agreements covering Bohack's employees. At the present

time thirteen collective bargaining agreements are in force and with the exception of one or two of those agreements which were negotiated on an industry-wide basis, I personally negotiated every one of them on behalf of Bohack.

3. In addition to my personal involvement with the negotiations leading to Bohack's agreement with Local 852 of the General Warehouseman's Union, effective June 15, 1970 through June 15, 1973, which is at issue in this case, I personally negotiated the two preceding collective agreements as well as the agreement currently in force with Local 852. Under all of those agreements and in addition, Bohack's agreement with Local 852 in force prior to June, 1967 when I became employed by Bohack, vacation benefits have been earned benefits; an employee must have actually worked in order to become entitled to a vacation benefit. In the course of negotiating the subject collective bargaining agreement no specific provision to the effect that an employee must actually work in order to become eligible for vacation benefits was included because in the past the agreement had never been subjected to another interpretation. Moreover, in every collective bargaining agreement covering Bohack's employees in other bargaining units, vacation benefits are earned benefits; employees must actually work in order to become eligible for a vacation regardless of the length of vacation such employee might otherwise receive by virtue of his seniority.

4. Subdivisions (F) and (J) of Article X of the subject agreement confirm the existence of a vacation work requirement. When an employee is laid off or becomes ill and is thereby unable

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to take a vacation already earned, then that employee would nevertheless receive whatever portion of his vacation that he had earned by working. On the other hand, if an employee returned to work after an extended leave of absence, he would not receive credit toward a vacation benefit for the time he was on leave.

5. Only one exception to the work requirement for vacation benefits exists and that exception, which is contained in Article X(I), concerns employees unable to work because of illness.

Melvin Levy

Sworn to before me this
day of November, 1973.

DAVID FLEISCHER
NOTARY PUBLIC, State of New York
No. 31-4505993
Qualified in New York County
Commission Expires March 30, 1975.

DEC 26 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME AM.....
P.M.....

-----x
ANTHONY E. LI PANI,

Plaintiff,

-against-

BOHACK CORPORATION,

Defendant.
-----x

73-C-740 ✓

ROBERT LOESCH,

Plaintiff,

-against-

BOHACK CORPORATION,

Defendant.
-----x

73-C-742

Appearances:

HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Plaintiffs
HAROLD J. FRIEDMAN, ESQ.
Assistant U.S. Attorney
Of Counsel

BATTLE, FOWLER, LIDSTONE, JAFFIN, PIERCE & KHEEL, ESQS.
Attorneys for Defendant
RICHARD ADELMAN, ESQ.
DAVID FLEISCHER, ESQ.
Of Counsel

BARTELS, D.J.

This is a consolidated action instituted by two employees of the defendant, Bohack Corporation ("Bohack"), under the Universal Military Training and Service Act, 50 U.S.C. App. §459 ("the Act"), to recover vacation benefits for the year they returned from military service to the employment of the defendant. Bohack claims that plaintiffs are not entitled to vacation pay because they did not satisfy ~~the work requirement~~ of the defendant's collective bargaining agreement for the year they returned and therefore did not earn the claimed benefits. The issue is whether or not vacation pay is a perquisite of "seniority" status as the term is used in the Act, despite any work provisions of the collective bargaining agreement. Since the facts are stipulated, each side has moved for summary judgment, and for the reasons stated below, we grant defendant's motion and deny plaintiffs' motion.

Plaintiffs are veterans, who left the employment of Bohack to enter the armed forces of the United States, and after completion of their military service, they were reinstated by Bohack to their former positions. LiPani was employed by Bohack as a warehouseman on May 6, 1969, until

his entry into the military service on July 14, 1969 (2 months and 8 days). He was reemployed by Bohack on October 18, 1971, and by the end of the calendar year 1971, had worked for Bohack approximately 4 months and 20 days. In June, 1972, he was given his first 2-week paid vacation and full sick leave allowance. Loesch was employed by Bohack as a warehouseman on March 10, 1969, and worked until July 31, 1969 (4 months and 20 days) when he left for military service. He was reemployed on October 18, 1971, and at the end of the calendar year 1971, had worked approximately 7 months and 2 days. In December, 1971, Loesch received his first week of paid vacation, and in June, 1972, received a 2-week paid vacation plus full sick leave allowance.

Bohack credited both plaintiffs with time spent in the service for purposes of computing seniority, for though neither plaintiff had been employed for six months before induction, upon reemployment after discharge both were determined to have seniority in excess of two years. At the end of 1971, Loesch had actually worked for Bohack in excess of six months, and since employees with two years seniority who work six months are entitled to one week's paid vacation, Loesch was given this benefit. However, LiPani had not

worked for six months, and was determined not to have earned a vacation for 1971. Loesch now sues for additional vacation pay of one week and sick leave allowance for the year 1971, and LiPani sues for a full two weeks vacation pay and sick leave allowance for 1971.

The relevant portions of Section 459 of the Act read as follows:

"(b) Reemployment rights

In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * in the employ of any employer and * * * makes application for reemployment within ninety days after he is relieved from such training and service * * * —

* * *

(B) if such position was in the employ of a private employer, such person shall —

(i) * * * be restored by such employer * * * to such position or to a position of like seniority, status, and pay;

* * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be

so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

The pertinent portions of the collective bargaining
^{1/}agreement concerning vacation rights and sick leave allowances clearly indicate in Article X(A), (B), (F), (G), (H) and (I) that employees were entitled to vacation pay and sick leave allowance earned during the year predicated upon work and not by the mere passage of time. For instance, in Article X(A) it is provided that employees must be in the employ of the Company "for a period of six (6) months of continuous working service" before entitled to one week's vacation with pay. Subparagraph (B) provides that vacation

pay must be computed "on the basis of the employees regular straight time weekly earnings including all premiums, if any." In subparagraph (F) it is provided that an employee entitled to a vacation who is laid off for lack of work will receive whatever vacation pay and sick leave "which has been earned in the past year plus vacation pay and sick leave pro-rated on the basis of the period worked during the year of said interruption of employment."

There is no claim by Bohack that plaintiffs are not entitled to all the seniority benefits they would have received on the moving escalator of terms and conditions affecting their employment comparable to the positions they would have held if they had remained continuously in Bohack's employment. For instance, when they returned to work they were placed on the seniority list as if they had never left, viz., the seniority of employees of over two years of service. Thus, they would have been treated in case of lay off as if they had been employed continuously from their respective employment dates in 1969 (Art. XI(D)2.) and in case of severance, would have also been entitled to severance allowance based upon the 1969 employment dates (Art. XVII(C)).

The issue here is whether seniority status under the Act, in light of the terms of the collective bargaining agreement, includes vacation pay not earned by work. We find nothing in Section 459(c)(1) and (2) of the Act requiring an interpretation of the status of "seniority" to include paid vacations not otherwise attached to seniority of non-veterans. The notion that the Act provides a returning veteran with an advantage or priority not otherwise accorded to non-veterans, has been explicitly rejected in Tilton v. Missouri Pacific Ry., 376 U.S. 169, 181 (1964), and in Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946), where it was stated, at p. 286:

"No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position mean no more."

We do not believe that Congress intended that the seniority status would be sufficient to satisfy a bonafide work requirement of a collective bargaining agreement applicable to all employees. It is our opinion that the decision in Kasmeier v. Chicago, Rock Island and Pacific Railroad Co., 437 F.2d 151 (10th Cir. 1971), correctly interprets the

statute and the Congressional intent. In that case the collective bargaining agreement provided that an employee must render 110 days of compensated service in the previous calendar year in order to qualify for vacation rights. Kasmeier had rendered only 53 days of such service in the year before the end of 1967 following his discharge from military service. The court upheld the defendant's denial of vacation pay for the year 1967, predicated upon the language of Section 459(c), categorizing vacation rights as "other benefits" based upon established rules and practices of the employer relating to employees on furlough or leave of absence. It then concluded that since the union agreement did not provide for vacation pay for employees on furlough or leave of absence without the requisite number of days of compensated service, Kasmeier had no claim for vacation pay, stating, at p. 155:

"If Kasmeier were to prevail herein, the discrimination would favor the veteran. For without meeting the collective bargaining agreement standards as non-veterans must do, the returning veteran could merely assert that military duty kept him too long to work the 110 days, and he would therefore be entitled to a paid vacation."

To the same effect is Young v. Southern Pacific Transportation Co., 84 L.R.R.M. 2546 (D.C.Cal., Sept. 19, 1973);

Connett v. Automatic Electric Co., 323 F.Supp. 1373 (N.D.Ill. 1971). See also Gentile v. United States Trucking Corp., 355 F.Supp. 960, 963-964 (S.D.N.Y.1973).

We similarly conclude in this case that the collective bargaining agreement requires that a paid vacation for employees must be earned by work, and that there is no provision for vacation pay for those who take a furlough or leave of absence without work. Plaintiffs have received all the rights and benefits which would have automatically accrued to them had they remained in Bohack's employment without entering military service, including such vacation pay and sick leave allowance to which they would have been entitled by work. We do not believe it is essential to label vacation pay as "other benefits" in order to reach our conclusion because the criterion here is whether under the collective bargaining agreement vacation pay accrued by the mere lapse of time and accordingly, was a right appertaining to seniority status or whether it was a right which had to be earned by work unrelated to the status of seniority.

Plaintiffs rely primarily on Locavnia v. American Airlines, Inc., 457 F.2d 1253 (9th Cir.1972), cert. denied, 409 U.S. 982 (1972), which in truth is directly contrary to our conclusion, subject to the dissent of Judge Battin. They also cite in support of their position, Accardi v. Pennsylvania Railroad Co., 383 U.S. 225 (1966), (involving severance pay based upon seniority); Eagar v. Magma Copper Co., 389 U.S. 1060 (1968), (where plaintiff had fulfilled a bona-fide work requirement of a collective bargaining agreement); Morton v. Gulf, Mobile & Ohio R.R., 405 F.2d 415 (8th Cir.1969), (involving the determination that military service must be considered as employment in calculating the amount of vacation pay to which the returning veteran was entitled); Edwards v. Clinchfield R.R., 408 F.2d 5 (6th Cir. 1969), (in which time spent in the military service was to be considered in determining the length of vacation to which a returning veteran is entitled); and Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 (5th Cir.1970). The first three cases have factual patterns which are at variance from the instant case and do not support the interpretation suggested by plaintiffs. Upon the Hollman case plaintiffs place great reliance. There the Court awarded the employees

vacation pay for the year in which they entered the military, which pay they had already earned except for the fact that they were not in civilian employment on the last day of the calendar year due to their induction. At the same time the Court refused to grant these employees unearned vacation pay for the year they returned. Thus, in fact, Hollman supports the position taken by this Court. Without adding to the literature on the subject, we agree with the analysis in the dissent in Locaynia, supra, distinguishing these cases. In this connection, we believe the Court's comment in Connett, supra, at p. 1379, is also singularly appropriate:

"The gist of the plaintiffs' argument is that any benefit that would have automatically accrued to a veteran had he stayed on his civilian job should be given to him upon his return. If this conception were adopted, any returning veteran would be entitled not only to annual vacation benefits for the years in which he was in the armed forces but also to regular pay by the employer for that period of time, as well as compensation for single paid vacation days, Christmas bonuses, and anything else the employer paid to employees during his absence. Plaintiffs seek to push the rationale of Accardi and Eagar to illogical extremes."

Defendant's motion for summary judgment is granted.

SO ORDERED.

Dated: Brooklyn, N.Y.,
December 21, 1973.

Dean R. Dantley
United States District Judge

FOOTNOTE

1/ Article X reads in part as follows:

"(A) All full time employees in the employ of the Company for a period of six (6) months of continuous working service shall receive one (1) week's vacation with pay. Employees in the employ of the Company for twelve (12) months or more shall receive two (2) weeks vacation with pay and one (1) week's scheduled sick leave as defined in Article XII(A). Employees in the employ of the Company five (5) years or more shall be entitled to a third week's vacation. Employees in the employ of the Company ten years (10) or more shall be entitled to a fourth week's vacation. Employees in the employ of the Company twenty-five (25) years or more shall be entitled to a fifth week's vacation.

* * *

(B) Vacation pay shall be computed on the basis of the employees regular straight time weekly earnings including all premiums, if any.

* * *

(F) Any employee entitled to a vacation who is laid off for lack of work without receiving his vacation, shall receive whatever vacation pay and sick leave which has been earned in the past year plus vacation pay and sick leave pro-rated on the basis of the period worked during the year of said interruption of employment.

(G) Employees on vacation, who are called back to work due to an emergency, shall be paid at the rate of double time in addition to the vacation pay. An employee, however, shall have the right to refuse the interruption of such vacation.

FOOTNOTE - p. 2

(H) Any worker who shall complete a full year shall receive his two weeks vacation in that year and one (1) week sick leave, or more, if eligible under the provisions of this Contract. Vacations shall be selected on straight seniority disregarding job classifications, with the exception of hilo mechanics who shall select vacations within their own classification.

(I) Time not worked by an employee because of illness shall be considered time worked for the purpose of computing the vacation of such employee, provided such employee has worked a minimum of thirty (30) days during the year."

Article XI reads in part as follows:

"(D) The seniority rule shall be applied to the employees covered by this Agreement for the purpose of layoffs, promotions, demotions, vacation and all other similar purposes in the following manner:

* * *

2. Lay off shall be made in accordance with seniority and recall shall be made in the reverse order of seniority."

Article XVII reads in part as follows:

"The Company agrees to the following severance pay plan:

* * *

(C) The following schedule, shall be the basis for the computation of severance allowance:

FOOTNOTE - p. 3

<u>Period Worked</u>	<u>Severance Allowance</u>
Less than two years ...	None
Two years or more	1 week's wages for each year of employ- ment."

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ DEC 26 1973 ★

----- x
ANTHONY E. LI PANI,

Plaintiff,

-against-

BOHACK CORPORATION,

Defendant.
----- x

TIME A.M. _____

P.M. _____

JUDGMENT

73 C 740

ROBERT LOESCH,

Plaintiff,

-against-

BOHACK CORPORATION,

Defendant.
----- x

73 C 742

A decision of John R. Bartels, United States District Judge,
having been filed on December 26, 1973, granting defendants motions
for summary judgment, it is
and ADJUDGED
ORDERED / that defendants' motion for summary judgment is
granted and the complaints are dismissed.

Dated: Brooklyn, New York
December 26, 1973

Louis Orzoff
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
ANTHONY E. LI PANI, et al., :
Plaintiffs, : AFFIDAVIT
- against - : Civil Action
POHACK CORPORATION, : No. 73 C 540
Defendant. :
----- X

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

ALEX MACBAIN, being duly sworn, deposes and say:

1. I am the Secretary Treasurer of Local 852, General Warehousemen's Union and I am Business Representative for Local 852 in connection with it's dealing with the Bohack Corporation and as such I am familiar with the business practices of Bohack regarding union employees and the computation of vacation pay and sick leave.

2. In computing vacation pay and sick leave benefits Bohack considers time spent by union employees on official union business whether they are paid by Bohack or by Local 852 as time worked.

3. In computing vacation and sick leave benefits, Bohack considers time spent by union employees on jury duty as time worked.

4. In computing vacation and sick leave benefits Bohack considers time spent by union employees who are ill and who are not working and are not being paid by Bohack but are collecting union disability benefits of up to 26

weeks while out sick as timed worked.

5. In computing vacation and sick leave benefits Bohack considers union employees who are injured in work related accidents and who are not working and are collecting workmen's compensation as time worked.

Dated: Brooklyn, New York
November , 1973

ALEX MCBAIN

Sworn to before me this
day of November, 1973
